

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

DFR APPAREL CO., INC.,

Plaintiff,

V.

TRIPLE SEVEN PROMOTIONAL
PRODUCTS, INC., Triple Seven
PROMOTIONAL
PRODUCTS, INC., DECO WEST, INC.,

Defendant.

Case No. 2:11-cv-01406-APG-CWH

**ORDER GRANTING DEFENDANT DECO
WEST, INC.'S MOTION FOR SUMMARY
JUDGMENT**

(Dkt. No. 45)

DFR sued defendant Triple Seven for claims arising from a purchase contract. Defendant Deco West was not a party to the contract between DFR and Triple Seven. DFR alleges Deco West is Triple Seven's alter-ego and thus a proper defendant in this action. Deco West now moves for Summary Judgment, arguing that DFR cannot demonstrate the facts necessary to pierce the corporate veil and hold Deco West liable under an alter ego theory. DFR has failed to raise a genuine dispute as to Deco West's alter-ego liability, and Deco West is entitled to judgment as a matter of law. I therefore grant summary judgment in favor of Deco West.

1. BACKGROUND¹

Deco West was not a party to the contract between DFR and Triple Seven, and had no direct involvement in the transaction between DFR and Triple Seven.² Melvin Kerr is the sole owner of Triple Seven, and he is the primary owner of West Coast Equities, which wholly owns Deco West.³

¹ DFR fails to contest most of Deco West's statement of undisputed facts. (Dkt. #45, at 3.) I find any facts uncontested by DFR to be undisputed for purposes of this summary judgment motion. Fed.R.Civ.P. 56(e)(2).

² (Dkt. #45, Exh. 3, at 5:10-20; 10:2-5; 116-10.)

³ (Dkt. #45, Exh. 2.)

1 Triple Seven was formed in 2008, and Deco West was formed in 2000.⁴ Both companies
 2 adhere to corporate formalities including propagating bylaws, holding shareholding meetings,
 3 maintaining separate bank accounts, filing independent tax returns, maintaining separate
 4 insurance policies, and accounting for any money that changes hands between the two
 5 companies.⁵ Deco West and Triple Seven both transact distinct business with distinct clients.⁶
 6 Deco West provides operational facilities and employees to Triple Seven for which Triple Seven
 7 pays Deco West a fee.⁷

8 **II. DISCUSSION**

9 **A. Legal Standard—Summary Judgment**

10 The purpose of summary judgment is to avoid unnecessary trials when there is no dispute
 11 as to the facts before the court.⁸ Summary judgment is appropriate when “the pleadings,
 12 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
 13 show there is no genuine issue as to any material fact and that the movant is entitled to judgment
 14 as a matter of law.”⁹ An issue is “genuine” if there is a sufficient evidentiary basis on which a
 15 reasonable fact-finder could find for the nonmoving party, and a dispute is “material” if it could
 16 affect the outcome of the suit under the governing law.¹⁰ In evaluating a summary judgment
 17 motion, a court views all facts and draws all inferences in the light most favorable to the
 18 nonmoving party.¹¹

19 The moving party bears the burden of informing the court of the basis for its motion,
 20 together with evidence demonstrating the absence of any genuine issue of material fact.¹² Once

21 ⁴ (*Id.*)

22 ⁵ (*Id.*)

23 ⁶ (Dkt. #45, Exh. 4, at 114.)

24 ⁷ (Dkt. #45, Exh. 4, at 114; 129-30.)

25 ⁸ *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

26 ⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)).

27 ¹⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

28 ¹¹ *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

12 *Celotex*, 477 U.S. at 323.

1 the moving party satisfies those requirements, the burden shifts to the party resisting the motion
 2 to “set forth specific facts showing that there is a genuine issue for trial.”¹³ The nonmoving party
 3 “may not rely on denials in the pleadings but must produce specific evidence, through affidavits
 4 or admissible discovery material, to show that the dispute exists,”¹⁴ and “must do more than
 5 simply show that there is some metaphysical doubt as to the material facts.”¹⁵ “The mere
 6 existence of a scintilla of evidence in support of the [nonmoving party’s] position will be
 7 insufficient.”¹⁶ The court may consider only evidence which might be admissible at trial in ruling
 8 on a motion for summary judgment.¹⁷

9 B. Analysis

10 Nevada law generally treats corporations as separate legal entities.¹⁸ But Nevada law
 11 allows alter-ego liability where the corporate form is abused and one corporation is merely an
 12 alter ego of a controlling entity.¹⁹ To hold Deco West liable as Triple Seven’s alter-ego, DFR
 13 must prove: (1) Triple Seven was influenced and governed by Deco West, (2) there is such unity
 14 of interest and ownership between the companies that one is inseparable from the other; and (3)
 15 “adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or
 16 promote injustice.”²⁰ “The corporate cloak is not lightly thrown aside, . . . the alter ego doctrine
 17 is an exception to the general rule recognizing corporate independence.”²¹

18 Deco West’s evidence portrays Deco West and Triple Seven as distinct, operating
 19 companies. Deco West also points to the absence of any evidence showing either that Triple
 20

21 ¹³ *Anderson*, 477 U.S. at 256.

22 ¹⁴ *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991),

23 ¹⁵ *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted).

24 ¹⁶ *Anderson*, 477 U.S. at 252.

25 ¹⁷ Fed. R. Civ. P. 56(c).

26 ¹⁸ *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841, 845 (2000).

27 ¹⁹ *Id.*

28 ²⁰ *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 807, 963 P.2d 488, 496 (1998).

²¹ *Id.* (internal citations omitted).

1 Seven was influenced by Deco West, or that respecting the corporate forms would result in
 2 injustice. In response, DFR provides scant admissible evidence in support of any of the alter-ego
 3 elements.²²

4 *i. Deco West's influence over Triple Seven*

5 Deco West argues there is no evidence it influenced or governed Triple Seven. DFR
 6 counters that Deco West and Triple Seven are both susceptible to control by Melvin Kerr.²³ But
 7 DFR seeks to make Deco West liable as Triple Seven's alter ego—not Melvin Kerr's—and DFR
 8 has provided no evidence Deco West actually influenced or governed Triple Seven in any way.²⁴

9 *ii. Unity of interest and ownership*

10 To determine the unity of interest between two companies, courts consider a number of
 11 factors, none of which is dispositive: (1) comingling of funds; (2) undercapitalization; (3)
 12 unauthorized diversion of funds; (4) failure to observe corporate formalities; (5) the existence or
 13 non-existence of separate bank accounts; (6) whether sister corporations have independent
 14 headquarters; (7) whether separate corporations had separate business responsibilities and
 15 operations; and (8) whether dividends were paid to shareholders.²⁵

16 Deco West has provided substantial admissible evidence establishing that both it and
 17 Triple Seven adhered to corporate formalities, did not comingle funds, maintained separate
 18 accounts, and accounted for all transactions.²⁶ DFR responds that Triple Seven used Deco West's
 19 facilities and employees, but Deco West provided evidence establishing that Triple Seven
 20 properly contracted for and paid to use these resources.²⁷ DFR also argues that Deco West and
 21

22 Most of the evidence DFR relies on is unauthenticated, and thus inadmissible for
 23 purposes of summary judgment. *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal
 24 citations omitted). For example, DFR cites to an advertisement, attached as Exhibit 4 to its
 Response, without any effort to authenticate the document.

25 ²³ (Dkt. #57, at 4-5.); (Dkt. #45, at 8.)

26 ²⁴ (Dkt. #1.)

27 ²⁵ *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884,887 (1987).

28 ²⁶ (Dkt. #45, at 3-5.)

²⁷ (Dkt. #45, Exh. 4, at 114; 129-30.)

1 Triple Seven commingled assets, but Deco West provided evidence verifying no commingling
 2 occurred.²⁸

3 In *Lorenz v. Beltio*, relied on by DFR, the Nevada Supreme Court found alter-ego liability
 4 because there was “overwhelming” evidence a company’s owner was solely using the company
 5 for his personal business.²⁹ There was uncontroverted evidence that revealed commingling and
 6 that the owner was using the company’s funds for personal uses.³⁰ There also was evidence of
 7 extreme undercapitalization.³¹ This is strikingly distinguishable from the situation here, where
 8 Deco West and Triple Seven have been distinctly operating for years, had no ownership interest
 9 in each other, and there is no evidence of undercapitalization or improper use of corporate funds.

10 Deco West has provided uncontroverted evidence establishing that it and Triple Seven
 11 have been operating as distinct businesses for several years. There is no evidence that the
 12 companies are improperly intermingled save that they share corporate officers or managers, and
 13 Deco West contracts its facilities out to Triple Seven. These facts fall well short of establishing a
 14 unity of interest between Deco West and Triple Seven.³²

15 **iii. *Injustice***

16 Even where two companies appear to be heavily intertwined, alter ego liability applies
 17 only if adherence to corporate forms would result in injustice.³³ In cases finding the injustice
 18 prong met, there is usually evidence proving the controlling entity somehow used the alter-ego

22 ²⁸ (Dkt. #45, Exh 3, at 255-59.)

23 ²⁹ *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 808, 963 P.2d 488, 496 (1998).

24 ³⁰ *Id.*

25 ³¹ *Id.*

26 ³² *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 377, 566 P.2d 819, 823 (1977) (failing to find
 27 alter ego liability even where two companies shared all shareholders and officers, the subsidiary
 28 was undercapitalized, and the parent company had actual ownership of the subsidiary).

³³ *North Arlington Med. Bldg., Inc. v. Sanchez Const. Co.*, 86 Nev. 515, 522,471 P.2d
 240,244 (1970).

1 company to commit tortious conduct, hide assets, or prevent debtors from collecting their debts.³⁴
 2 For example, the Ninth Circuit upheld summary judgment against a plaintiff's alter ego claim, in
 3 part, because the plaintiff failed to raise a triable dispute as to whether the corporate form was
 4 abused to hide money or avoid liabilities.³⁵

5 DFR concedes it must provide facts showing it will be damaged by Deco West's alleged
 6 abuse of the corporate form,³⁶ but DFR does not identify any potential damage or injustice. There
 7 is no evidence indicating Triple Seven was undercapitalized, and there is no evidence DFR was
 8 somehow harmed, or will be harmed, even if Deco West and Triple Seven are intermingled. DFR
 9 cites to *Lorenz v. Beltio*, but this case hurts DFR more than it helps. In *Lorenz*, the Court held
 10 injustice would result because the company had been undercapitalized which resulted in the
 11 debtor having no recourse for its claims.³⁷ No such showing has been made in this case.

12 ***iv. Balance of alter-ego factors***

13 Deco West has met its burden to establish that no genuine issue of material fact exists as
 14 to each of the alter-ego elements, any of which would be sufficient to warrant summary judgment.
 15 DFR has failed to provide admissible evidence raising a triable issue as to any of these elements.
 16 I therefore find Deco West has no alter-ego liability for Triple Seven.

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23 ³⁴ *Chase Bank USA, N.A. v. Dispute Resolution Arbitration Grp.*, 02:05-CV-
 24 1208LRHLRL, 2007 WL 1577853 (D. Nev. May 31, 2007) (injustice prong met because
 25 evidence indicated corporation was created to further tortious conduct);

26 ³⁵ *Peroulis v. Kriston*, 540 F. App'x 807 (9th Cir. 2013).

27 ³⁶ (Dkt. #57, at 8.)

28 ³⁷ *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 963 P.2d 488 (1998).

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Deco West Inc.'s Motion for Summary Judgment is GRANTED.

DATED THIS 30th day of September, 2014.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE